After a painstaking review of the voluminous factual record presented to it, the District Court granted Cagle JV's Motions for Summary Judgment by Orders dated March 24, 2004 (Adkins)[App. 81-100], March 26, 2004 (Mims)[App. 101-122], September 28, 2004 (Wheeler)[App. 62-80] and September 29, 2004 (Glass)[App. 40-61]. Without discussion of any legal issues or standards, the District Court concluded that petitioners had not established any facts in support of any of their claims sufficient to withstand summary judgment. As to petitioners' PSA claims, the District Court pointedly noted the lack of *factual* support but demonstrated its thorough review and grasp of the record before it:

> • Glass has produced *no evidence* that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. * * * *Glass cannot identify any instance* where he was charged for feed that he did not receive.

[App. 52-53 (emphasis added).]

> • With respect to misweighing: *Glass* "has *failed to provide any admissible evidence* that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof."

[App. 55 (emphasis added).]

* * *

> • *Wheeler* has produced *no evidence* that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. * * * *Wheeler cannot identify any*

instance where he was charged for feed that he did not receive.

[App. 71 *(emphasis added).*]

- With respect to misweighing: *Wheeler* "has *failed to provide any admissible evidence* that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof."

[App. 74 (emphasis added).]

* * *

- The *Adkins* have produced *no evidence* that they received a substantial number of bad birds, much less that Cagle JV intentionally provided them with bad birds.

[App. 90 (emphasis added).]

- As to their claims of receiving insufficient or inferior feed, *neither Jill nor Lucius could point to any specific instances.* In fact, Jill stated that all growers had problems with feed delivery from time to time.

[App. 91 (emphasis added).]

- [T]he *Adkins cannot point to a specific incident* during which their birds were misweighed.

[App. 92 (emphasis added).]

* * *

- ...*Mims* ... produced *no evidence* that [he] received a substantial number of

> bad birds, much less that Cagle JV intentionally provided [him] with bad birds.... Mims *never noted ... alleged deficiencies* on the Chick Delivery Reports *or kept any records documenting such deficiencies.*

[App. 113 (emphasis added).]

> • As to [his] claims of receiving insufficient or inferior feed, ... *Mims identified only three instances* during the seven years [he] grew chickens when Cagle JV failed to timely deliver feed or to pick up [his] birds. The feed delay was the result of the feed mill breaking down. The delay in picking up the birds was the result of bomb threats at the Camilla plant and a lightning strike.

[App. 113 (emphasis added).]

> • ... *Mims cannot point to a specific incident* during which [his] birds were misweighed.

[App. 114 (emphasis added).]

In contrast to petitioners' now strident fabrications in filing their consolidated Petition for Writ of Certiorari ("Petition") with this Court, even the most cursory review of the District Court's decisions reveals that its disposition of petitioners' PSA claims involved *no* legal issue, including the need *vel non* of competitive injury under the PSA or any other issue of interpretation or construction of that statute. The District Court's sole grounds for disposition of each petitioner's PSA claim – as all their claims – was the complete lack of evidence supporting their allegations as well as petitioners' admissions of lack of evidence.

Petitioners' separate *de novo* appeals to the Court of Appeals for the Eleventh Circuit were heard by four separate panels, and premised *solely* on the District Court's alleged failure to properly evaluate petitioners' "evidence." Contrary to petitioners' present Petition, *no* issue regarding interstate commerce and the attendant requirement that alleged PSA violations affect competition, as may have been presented in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005)("*London*"), *petition for cert. filed*, No. 05-411 (September 28, 2005), was implicated or even raised by petitioners in any of the four appeals.[4] For that reason alone, this Petition should be rejected.

By Orders dated April 5, 2005 (Glass), June 8, 2005 (Wheeler), June 13, 2005 (Adkins) and June 15, 2005 (Mims), four separate panels, comprised of ten different judges of the Eleventh Circuit, affirmed, in full, each judgment entered by the District Court.[5] With respect to petitioners' PSA claims, each of these four separate panels of the Eleventh Circuit concluded that the District Court's *factual* determinations were proper and affirmed the grant of summary judgment against petitioners:

> • The *Adkins have alleged* that Cagle JV violated [the PSA] when it (1) provided them with inferior birds, (2) provided them with inferior or insufficient feed, (3) improperly weighed birds they had raised, and (4) offered them an unfair

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[4] *London* is currently before this Court, a Petition for Writ of Certiorari having been filed on September 28, 2005 and docketed at No. 05-411. The legal issue presented in *London* – effect on competition – is not relevant to any of the cases consolidated as part of this Petition.

[5] Glass filed a motion for rehearing en banc which was denied by the Eleventh Circuit on June 1, 2005, "*no* Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc...." [App. 124 (emphasis added).]

arbitration contract. * * * *We do not decide whether these factual allegations, if proved, would establish a violation of the PSA.* For the present case, it is sufficient for us to hold *that the district court was correct in finding that the Adkins did not prove their allegations*, and that the few facts they did produce were clearly insufficient to make out a PSA claim.

[App. 17 and n.7 (emphasis added).]

* * *

- *Glass's PSA claim fails.* Although Glass argues that Cagle Foods violated the PSA by providing him with inferior birds and feed, and improperly weighing birds, *Glass presented no admissible evidence to support these arguments.* Glass also erroneously argues that the offer by Cagle Foods of a raise in exchange for signing an arbitration contract violates the PSA. As explained by the district court, the arbitration contracts did not violate the PSA because the contracts were offered to all growers. *The district court properly granted summary judgment on Glass's PSA claim.*

[App. 2-3 (emphasis added).]

* * *

- *Wheeler's PSA claim fails.* The PSA prohibits 'unfair, unjustly discriminatory, or deceptive practices or devices,' or 'any undue or unreasonable

performance or advantage.' 7 U.S.C. §§ 192(a) and (b). Although Wheeler argues that Cagle Foods violated the PSA by providing him with inferior birds and feed and improperly weighing birds, *Wheeler presented no admissible evidence to support these arguments.*

[App. 7 (emphasis added).]

* * *

- We conclude that the district court properly found that *Mims lacked sufficient evidence to support his PSA claim.*

[App. 30 n.2 (emphasis added).]

- [W]e conclude that *Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual [PSA] allegations.*

[App. 31 (emphasis added).]

In addition to the PSA claims, the judgments below disposed of *all* of petitioners' claims and for the same reason – *lack of supporting evidence.* For example, with respect to Wheeler, the Eleventh Circuit held:

- Wheeler's fraud and Georgia RICO claims fail for the same reason his PSA claim fails: *he did not present any admissible evidence that Cagle Foods engaged in the conduct alleged.*

[App. 8 (emphasis added).]

- Wheeler's fraud in the inducement claim also fails because he did not

establish the elements of the cause of action.

[*Id.*]

- Wheeler's AFPA claim fails because Wheeler *presented no evidence* that Cagle Foods or its agents interfered with his attempt to organize and participate in a grower or poultry association or discriminated against him for such participation.... *Wheeler did not present any evidence of retaliation.*

[App. 9 (emphasis added).]

- Finally, Wheeler's breach of contract claim fails because the *undisputed evidence* shows that Cagle Foods did not breach the grower contracts with Wheeler....

[*Id.* (emphasis added).]

Separate panels of the Eleventh Circuit independently reached similar holdings with respect to Glass, the Adkins and Mims on their separate appeals. [App. 3-4, 19-23, 35-8.]

In sum, four separate panels of the Eleventh Circuit (and the entire Eleventh Circuit as to *Glass*) reviewed the extensive factual records *de novo* and held that petitioners presented no admissible evidence to factually support *any* of their claims, *whatever the applicable law*. The issues raised in *London* concerning the scope of the PSA were irrelevant to that review and the resulting decisions.[6] In

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[6] Petitioners' reference to Cagle JV's request for attorneys' fees below, exactly as Congress declared that it was entitled to seek under the AFPA's attorneys' fee provision, 7 U.S.C. § 2305(c)(1), is yet another act of desperation. The exercise of its statutory rights can hardly be declared

fact, petitioners do not argue that any of the four Eleventh Circuit decisions in this case are "in conflict with the decision of another United States court of appeals on the same important matter"; *or* that any of those decisions were decided in a manner that conflicts with a decision by a state court of last resort. *See* Supreme Court Rule 10(a). *Nor* can petitioners seriously suggest that those decisions, upon review of a factual record with a dearth of facts supporting petitioners' distorted view of this industry, "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...." *Id.*

REASONS FOR DENYING THE PETITION.

I. Neither The Record Nor The Decisions Below Raise The Question Presented In *London v. Fieldale Farms Corporation.*

In light of the nature of the record below, petitioners' reference to *London* is without substance but consistent with petitioners' complete lack of candor with the judicial system at all levels, as Cagle JV has repeatedly and successfully demonstrated. Whether misstating the record facts below, or now the legal issues, petitioners continue their campaign of deception. Quite simply, petitioners can establish no basis for any consideration of this appeal, especially for any "compelling reasons," as required by Supreme Court Rule 10.

Although irrelevant to any issue here, the sole question presented for review in the Petition for a Writ of Certiorari filed in *London* ("*London* Petition") is "*whether*

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to be an effort "to deter growers from seeking redress." [*See* Petition at 18.] Fee shifting under the AFPA was endorsed by Congress and petitioners should have been aware of that possibility upon filing these cases.

the PSA prohibits *any* unfair, unjustly discriminatory, or deceptive practices *or only those that have an anticompetitive effect*." [*London* Petition at 6 (emphasis added).] Stated differently, the issue raised in *London* is "whether the PSA requires a showing of competitive injury...," allegedly the subject of a conflict among various federal circuit courts of appeal, and presents a pure question of law to be resolved through textual analysis of the statute and the legislative history of the PSA. [*Id.* at 22-3.]

This Petition, and the four cases below at both the District Court and the Court of Appeals, involve *none* of these elements, nor were the issues raised in *London* even raised by these four petitioners. Yet, in an effort to save this baseless litigation (but without any analysis of the multiple decisions below), petitioners, now for the first time, "adopt and rely upon the petition in *London*" and suggest "that its resolution should result in an order of remand for review of each of their cases by the Eleventh Circuit Court of Appeals using the proper interpretation of 'unfair' and 'unjustly discriminatory'." [Petition at 14.] However, "close proximity" of these decisions in time, as suggested by petitioners [*see* Petition at 5], is hardly a relevant basis to suggest a legally significant relationship or any basis for this Petition. In fact, these cases did not implicate the pending *London* Petition, or the legal issue raised in *London*, in any way and the attempt to bootstrap these cases to *London* is disingenuous. As such, there can be no basis to defer the denial of the Petition here, even if the *London* Petition were granted.

In *London*, a jury determined that termination of plaintiffs' poultry grower contract "was without economic justification and violated the PSA...." The district court granted defendant's motion for judgment as a matter of law on grounds that plaintiffs presented no evidence as to the competitive effects of their termination. [*London* Petition

at 3 and 25a-26a.] In contrast, and as set forth in detail *supra*, petitioners' PSA claims here – as all of their claims – failed due to petitioners' threshold failure to produce *any* admissible evidence supporting their allegations of harm sufficient to withstand summary judgment and not due to any legal issue, especially the issues regarding competitive injury raised in *London*. Accordingly, as the Eleventh Circuit determined (*in multiple panel decisions involving ten individual judges*), "the Adkins did not prove their allegations" [App. 17 n.7]; "Mims lacked sufficient evidence to support his PSA claim" and "has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual [PSA] allegations" [App. 30 n.2, 31]; and Glass and Wheeler "presented no admissible evidence to support these [factual] arguments." [App. 2, 7.] That the decisions below turned *solely* on petitioners' failure to make the threshold *factual* showing sufficient to withstand summary judgment – and *not* on any legal standard for a PSA violation – was made explicit by the Eleventh Circuit. For example, with respect to the Adkins' PSA claim, the Eleventh Circuit, after summarizing the factual allegations (inferior birds and feed, misweighing, *etc.*) and reviewing the record, explained that, in affirming summary judgment, it need *not* determine any legal issue or standard regarding the application of the PSA:

> *We do not decide whether these factual allegations, if proved, would establish a violation of the PSA.* For the present case, it is sufficient for us to hold that the district court was correct in finding that *the Adkins did not prove their allegations*, and that the few facts they did produce were clearly insufficient to make out a PSA claim.

[App. 17, n.7 (emphasis added).]

Similarly, with respect to Mims, while the Eleventh Circuit referenced *London* and its holding that a showing of

anticompetitive effect is necessary to sustain a PSA claim, the Court made clear again that it did not need to determine that legal issue in sustaining summary judgment:

> We assume *arguendo* that Mims is entitled to a jury on his PSA claim if he could produce evidence sufficient to raise a genuine issue with respect to *any* of his factual allegations. However, we conclude that *Mims has not produced sufficient evidence* such that a rational juror could find in his favor on *any* of these factual allegations.

[App. 31 (emphasis added).]

The decisions below clearly resulted from an intensive *factual* analysis of the records in each of four cases. There was no legal issue presented *or even argued* by petitioners based on *London* – as such, a decision in *London*, even if certiorari is granted in that case, could have no impact here, as competition and competitive injury were not issues in these petitioners' cases.[7] The outcome below in each petitioner's case was *fact driven* – none of the petitioners presented any facts sufficient to withstand summary judgment, as all of the lower courts consistently concluded. To suggest otherwise, and seek relief from this Court based on the *London* Petition (in light of this Court's Rules), evidences a lack of understanding of those decisions, devious misrepresentation to the extreme, or complete desperation. Despite petitioners' baseless (if not fabricated)

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[7] Likewise, *Pickett v. Tyson Fresh Meats, Inc.*, Dkt. No. 04-12137 (11th Cir., August 16, 2005), a subsequent decision by the Eleventh Circuit, offers no support for petitioners here. [*See* Petition at 5-6.] That case, which dealt with the validity of "marketing agreements" in the meat-packing industry, relied on *London*, but not *Adkins* (which merely acknowledged the *London* decision), as the *legal* standard for a PSA violation – a standard which has no application here as the decisions below were premised totally on the dearth of supporting facts.

pleas, neither the record nor the decisions below raise the question presented in *London* – there can be no basis to defer these cases until a decision in *London*. This Petition should be denied now, without reference to any outcome in *London*. Cagle JV is entitled to end petitioners' legal war of attrition now.

II. The Eleventh Circuit's Decisions Were Premised Solely On The Lack Of Supporting Threshold Facts To Sustain Petitioners' PSA Claims And Not On Any Legal Interpretation Of The PSA Requiring "Intentional Rather Than Negligent" Conduct.

In recognition that their *London* argument is fallacious, petitioners proceed with their equally flawed assertion that the Eleventh Circuit somehow "interpreted" the language of the PSA to deny petitioners its protections. Thus, petitioners argue that the Eleventh Circuit, "[b]y requiring proof of discriminatory intent ... misapplied the plain language of the PSA's prohibition against *any unfair practice*" and "improperly imposed upon the Petitioners a burden to show ... intentional, rather than negligent" conduct. [Petition at 15-16.] Petitioners' argument doubly runs afoul of the record and the Eleventh Circuit's decisions since it (a) assumes that sufficient evidence of *any* "unfair practices" was produced, which was not, and (b) assumes that the Court imposed a requirement of intentional conduct to support a PSA claim, which it did not.

To support this fallacious argument, petitioners first posit the existence of "undisputed evidence" that they were given "poor quality and sick birds" and, incredibly, that they "ran out of feed almost *every flock*." [Petition at 14-15.] These assertions are untenable in face of the clear evidence of record and petitioners' admissions, as summarized correctly by the Eleventh Circuit: "Glass presented no

admissible evidence to support these arguments" [App. 2]; "Wheeler presented no admissible evidence to support these arguments" [App. 7]; "the Adkins did not prove their allegations" [App. 17, n.7]; and "Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual allegations." [App. 31.]

Moreover, in affirming the decisions of the District Court, despite petitioners' false assertions to the contrary, the Eleventh Circuit *expressly* did *not* impose a requirement of intentional conduct. Indeed, that the Eleventh Circuit was not even presented any issue of "intentional rather than negligent" conduct under the PSA is amply confirmed by its clear holding as to Mims, which is equally applicable to *all* petitioners and bears repeating:

> We assume *arguendo* that Mims is entitled to a jury on his PSA claim if he could produce evidence sufficient to raise a genuine issue with respect to any of his factual allegations. However, we conclude that Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual allegations.

[App. 31.][8]

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[8] The very Appendix cites referenced by petitioners [Petition at 14] destroy their argument that the Eleventh Circuit required a showing of intentional conduct. *Glass*: "Glass presented no admissible evidence to support these arguments." [App. 2.] *Wheeler*: "Moreover, we agree with the district court that [Cagle JV] produced 'unrefuted evidence that it is virtually impossible for Cagle [JV] to target specific farms for delivery of inferior birds.' As to his complaint of insufficient and inferior feed, Wheeler did not identify one instance where he was charged for feed he did not receive, and he admitted that he consistently checked his feed inventory to verify feed deliveries. As to his complaint about improper weighing of birds, we agree with the district court that a reasonable reading of the evidence attributes any improper weighing to 'sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily,' none of which violated the PSA. Moreover, the deposition testimony on which Wheeler relies shows that other weighing

Likewise, in finding *no evidence* of *any* conduct violative of the PSA, the District Court, as to each petitioner, also determined that there was *no* proof of *intentional* conduct:

> Glass [Wheeler, Adkins, Mims] produced *no evidence* that he received a substantial number of bad birds, *much less* that Cagle JV *intentionally provided* him with bad birds.

[App. 52, 71, 90, 113 (emphasis added).]

Where there is no evidence of *any* "bad" conduct, there can be no "intentional" bad conduct. Petitioners' assertion that the Eleventh Circuit "improperly imposed upon the Petitioners a burden to show ... intentional, rather than negligent" conduct under the PSA [Petition at 16] is demonstrably false, and this Petition should be denied.

III. All Of Petitioners' Arguments Are Premised On Alleged Erroneous Factual Findings, An Insufficient Ground For Granting Certiorari.

Petitioners' final argument that "[t]he Eleventh Circuit ignored the standard for review of summary judgment" simply reflects petitioners' disagreement with the factual findings of the courts below. [*See* Petition at 18: "In affirming summary judgment ... the Eleventh Circuit made the same error as did the district court. The court drew all inferences from the disputed facts in favor of Cagle Foods."] Indeed, petitioners' disagreement with the factual findings below permeates their entire present Petition. As

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discrepancies ended several years before Wheeler became a grower." [App. 7-8.] *Adkins*: "There is no evidence that the Adkins received a substantial number of inferior birds. ... [T]he Adkins cannot identify any instances where Cagle JV misweighed their birds after 1995." [App. 17-8.]

such, for that reason alone this Petition for Writ of Certiorari must be denied:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. * * * *A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.*

Supreme Court Rule 10. (Emphasis added.)

Thus, the decisions of the Supreme Court reflect the general rule that the Court will deny certiorari when, as here, review is sought of a lower court decision that turns exclusively on an analysis of the particular facts raised. *See United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.") This general rule is even more applicable where the district court's factual determinations are affirmed by the court of appeals. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538 (1949)("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

While "the perceived correctness of the judgment" sought to be reviewed is not one of the factors on which the discretion of the Supreme Court depends when reviewing applications for certiorari, *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S.Ct. 2437, 2447 (1974)(Rehnquist, J.), in this case the District Court and all the judges on the Eleventh Circuit "got it right." A few examples of petitioners' admissions and the quality of petitioners' "evidence" presented below serve to confirm this conclusion, and, more

important, the care with which the District Court and the Eleventh Circuit parsed the records and addressed the evidence. Petitioners' suggestion that the Eleventh Circuit decisions contained "little analysis of the record" is belied by any review of those decisions themselves, which fully and properly analyzed the record. The lack of "pro-petitioner" inferences of which petitioners complain [App. 19] speaks resoundingly to the quality of the evidence presented by petitioners and not to any legal or factual error.

Petitioners principally contracted with Cagle JV to grow broilers at a time when Cagle JV was starting up its operations in south Georgia and was recruiting the various types of growers needed for the integrated production of chicken meat. [App. 42, 64, 83, 103.] As part of the recruiting process, each petitioner (except Glass, who prepared his own projections based upon his investigation) obtained income and expense projections generated by Cagle JV. These projections were based on industry averages and actual production on other farms in Georgia and, over time, proved to be accurate. [App. 57, 76, 85, 118.] More significantly, before contracting with Cagle JV, each petitioner undertook an independent investigation of the poultry growing industry, including discussions with poultry farmers already engaged in the business, and confirmed that Cagle JV's projections were reasonable. [App. 43-4, 58, 65, 84-5, 104.] As part of the recruiting process, petitioners were made aware that, as Cagle JV's operations expanded, its marketing strategies would change, resulting in changes in the sizes of the flocks and birds grown by petitioners. [App. 43, 66, 84, 105.]

Each petitioner "essentially admitted during depositions that the written projections [provided by Cagle JV] were not inaccurate." [App. 57, 76, 96, 118.] Despite their sweeping allegations that "Cagle JV caused fraudulent final statements [showing, *inter alia*, bird weight and pay] to be mailed," none of the petitioners could "point to a single

statement shown to be fraudulent." [App. 20, 75, 94, 117.] These admissions, among others, eroded all of petitioners' PSA and fraud-based claims. Similar admissions doomed their AFPA claims: "Glass testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the [UPGA]," nor did he provide any evidence of retaliation for his membership.[9] [App. 4, 60; as to the other petitioners, *see* App. 9, 22, 79, 98, 110, 121.]

Also, "Glass ... admit[ted] that the bird quality problems he experienced were no different than what other growers experienced." [App. 48.] Both Glass and Wheeler admitted that they regularly checked their feed inventory to verify correct feed deliveries. [App. 53, 71.] While "Wheeler complained that the bigger birds resulted in less flocks per year, [he] acknowledged that with per pound increases in pay, his income stayed the same or improved." [App. 76.] Similarly, "[t]he Adkins did not complain when the flock sizes were reduced" since "[t]he increase in average size made up for the loss in the number of birds." [App. 86; *see also* App. 60, 118 for similar evidence for Glass, Mims.] None of the petitioners could identify any instances where Cagle JV misweighed their birds. [App. 18, 68, 92 ("the Adkins cannot point to a specific incident during which their birds were misweighed").] Indeed,

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[9] Petitioners' statements concerning their purported performance declines [*see* Petition at 10] are false and were properly rejected by the lower courts. Glass performed better and achieved his highest revenue after his involvement in the growers' association and meeting with Doug Cagle -- his rankings were unaffected. [*Glass*, Memorandum of Law in Support of Motion for Summary Judgment, Exs. "A"-"B."] Moreover, his rankings improved at one of his farms (known as Cypress Bottom) over the entire period, *and immediately improved* following the critical events (becoming active in the association). [*Glass*, MSJ App., Tab 128.] The Adkins' several farms similarly improved in grower rankings (from *48* of 92 in 1998; to *32* of 93 in 1999; and to *17* of 88 in 2000 at one; and from *80* of 93 in 1999 to *33* of 88 in 2000 at the other) despite joining the growers association. [*Id.*] In fact, the Adkins received an award from Cagle JV for their performance in 2000 (even before suit was filed). [*Adkins*, MSJ App., Tab 7 at 62-3.]

before the courts below, petitioners entirely ignored their burden to present facts, *as to them*, to support their claims rather than generalized, ambiguous "beliefs." Petitioners' admissions, especially when viewed with their failure to come forward with affirmative evidence of bad birds, feed and misweighing, clearly warranted the entry and affirmance of summary judgment on petitioners' claims, and "supervisory" review by this Court is not warranted.

None of the multiple affidavits submitted by petitioners here [App. 138-156, 161-64] or others proffered below support any of the "facts" now alleged in the Petition or petitioners' claims below. Indeed, the affidavits, including "statements" by former employees, do not even mention any of the petitioners or were recanted by the affiant. For example, Joe Gaines admitted he was joking when he suggested preferential treatment. [App. 154.] And, as the District Court agreed, a review of petitioners' own weight tickets (which indicated the times weighed) confirmed that weighing was *not* delayed at all, much less to an arbitrary time in the morning (as misrepresented by petitioners at all judicial levels despite their own documents). [*See, e.g.*, App. 114.]

This dearth of specific, probative evidence, and misrepresentation of the record, did not escape the attention of the Eleventh Circuit. For example, the Eleventh Circuit rejected the growers' allegations that Cagle JV "targeted [them] to receive poor flocks," noting that their "strongest" alleged evidence, the affidavit of a former "chick bus driver" (Kenneth E. Cabiness), did not even suggest targeting:

> The driver's affidavit merely stated that he recalled chick deliveries being changed from one farm to another and being told that

> certain houses were not ready and he needed to take the chicks to another farm.

[App. 31, n.4.][10]

Instead, the Eleventh Circuit appropriately found that the growers had "produced no evidence suggesting that Cagle [JV] targeted [them] to receive poor flocks or even suggesting a likelihood of it." [App. 32.]

Moreover, contrary to petitioners' representations to this Court, the District Court concluded that, even crediting "plaintiffs' interpretation" of Bennie Morris' testimony regarding weighing (but ignoring Morris' clear statement that any weighing irregularities ended in 1987), petitioners still failed to meet their burden to show that *their* birds were misweighed:

> Lastly, as correctly pointed out by Cagle JV, this is not a class action. Even if Plaintiffs' interpretation of Morris testimony were true, the Adkins cannot point to a specific incident during which *their* birds were misweighed.

[App. 92 (emphasis added); *see also* App. 114 (Mims).]

A final example of the "quality" of the evidence submitted by petitioners below (or lack of it) is the so-called "regression analysis" prepared by petitioners' expert, Dr. Robert Taylor. The report containing the "regression analysis," which purported to demonstrate, mathematically, that petitioners were discriminated against in retaliation

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[10] Petitioners continue to misstate the Cabiness Affidavit here by again suggesting that Cabiness stated that the "chick delivery schedule" could be manipulated by Cagle JV to target growers for poor quality chicks. [Petition at 11.] As the District Court and Eleventh Circuit concluded, upon reviewing that evidence, even the most cursory review of the Cabiness Affidavit makes clear that Cabiness made no such statement.

for joining the UPGA and refusing the 1999 arbitration contract, at most stated only that there was "weak" support for any correlation. [*Mims*, MSJ App., Tab 84 at 4; *Glass*, MSJ App., Tab 121 at 103-4.] More important, during his deposition, Taylor admitted that his report and "regression analysis" did *not* show discrimination nor, critically, causation, but that it was simply "information." [*Glass*, MSJ App., Tab 121 at 76-7.] In fact, Taylor admittedly failed to consider, let alone eliminate, other relevant factors which could affect these growers' performance, nor could he exclude management by the growers as a factor affecting their net pay. [*Id.* at 51-2, 72-3, 92-3, 110-2, 126-8.] This type of "analysis" flies in the face of the established standard set forth in *Cooper v. Southern Co.*, 390 F.3d 695, 726 (11th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 7663 (October 17, 2005), which petitioners do not challenge:

> Even if we accept all the calculations underlying [the expert's] reports as correct, the reports' conclusions are of very limited value because the data on which those calculations were based was not meaningfully tailored. That is, even crediting as true the conclusions, we do not believe that a jury reasonably could infer, based on the evidence, that the plaintiffs established a pattern and practice claim. Summary judgment was therefore properly entered for the defendants....

Ultimately, Taylor conceded that he could not testify to a reasonable degree of scientific or professional certainty that Cagle JV discriminated against any of the petitioners, and admitted that his "estimate" was merely "speculation or

conjecture."[11] [*Glass*, MSJ App., Tab 121 at 91-3, 338.] In light of Taylor's concessions, petitioners' suggestion that his so-called report should trigger this Court's rare "supervisory" review under Supreme Court Rule 10(a) confirms the lack of any good faith basis for review and this Petition.

The Eleventh Circuit's review of the District Court's grant of summary judgment in each petitioner's case was *de novo*. Hence, the District Court and the Eleventh Circuit, upon full review of the records, found petitioners' cases lacking and made the appropriate factual findings. Those factual findings, given petitioners' admissions, and the lack of evidence presented on petitioners' behalf, are correct. Consistent with Supreme Court Rule 10 and its prior decisions, the Supreme Court should reject petitioners' misguided invitation "to review evidence and discuss specific facts." *United States v. Johnson, supra.*

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Despite petitioners' repeated, but misguided pleas, there also can be no basis to defer this decision at this time as these cases were factually (not legally) driven and no overriding legal principle or

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[11] *Adkins*: Taylor admitted that 30% of the factors affecting the Adkins' net pay could *not* be explained but did not relate to any purported retaliation by Cagle JV, and that he had not excluded performance-based factors, including the Adkins' management. [*Glass*, MSJ App., Tab 121 at 88.] *Glass*: Taylor admitted that his testing results were "unreliable analyses" and "totally insignificant," not even measuring weak support. [*Glass*, MSJ App., Tab 121 at 109-110.] *Wheeler*: Taylor concluded that "being a member of the growers association only [had] a *slight* affect on net pay adjustments" and that *any* negative impact was "recovered following the filing of his complaint." [*Wheeler*, MSJ App., Tab 74 at 4.] He characterized his conclusion of any relationship as "weak" with a low level of confidence in the regression analyses. [*Glass*, MSJ App., Tab 121 at 101.]

conclusion had any relevance. No decision by this Court in connection with the pending *London* Petition will cause a different result in these cases – even a reversal of the Eleventh Circuit's decision in *London* cannot change the factual records in these four cases nor add any facts which would somehow support petitioners' false and baseless assertions.

RESPECTFULLY SUBMITTED,

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No. 05-426

In The

Supreme Court of the United States

MARK A. GLASS and
MARK A. GLASS ENTERPRISES, INC., *et al.*,

Petitioners,

v.

CAGLE FOODS JV, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

A. After Briefing and Urging the *London* Standard Below, Respondent Cannot Now Assert That the *London* Standard is Unrelated to Petitioners' PSA Claims.

The Response claimed repeatedly that the issue raised in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), *pet. cert. pending* – "only . . . practices affecting competition are prohibited by the PSA" (*London*, No. 05-411, App. 11a) – was not raised in these cases (Response 16,18,19). But, in fact, Respondent had urged that standard below in these cases at page 14 in its brief in *Adkins v. Cagle Foods JV, LLC,* No. 04-11447 (11th Cir. 06/13/2005), at page 18 in its brief in *Wheeler v. Cagle Foods JV, LLC,* No. 04-15444 (11th Cir. 06/08/2005) and at page 22 in its brief in *Glass v. Cagle Foods JV, LLC,* No. 04-15431 (11th Cir. 04/05/2005).

In addition, the Response failed to explain that the *London* issue was squarely addressed by the Eleventh Circuit in *Mims v. Cagle Foods JV, LLC*, No. 04-11570 (11th Cir. 06/15/2005). In *Mims*, the Eleventh Circuit found that the Respondent terminated Mims' contract after the flock placed on Mims' farm in January 2001, and then refused to place any more birds on the farm managed by Mims as long as Mims was the manager. (Pet. App. 29) Finding the facts as to termination of the contracts with inferences for Mims (Pet. App. 29, fn.1), the court then cited *London v. Fieldale* that "termination of a contract without economic justification is insufficient to sustain a claim under the PSA absent the showing of an anticompetitive effect." (Pet. App. 30, fn.2)

The Response found it convenient to completely avoid the legal issues framing each decision, and it ignores much of the Petitioners' argument, and much of what was said by the Eleventh Circuit, in its four opinions. Facts sufficient under the negligence standard previously accepted for the PSA in this Court were seen as lacking by the Eleventh Circuit, persuaded by Respondent to require proof of intentional conduct or "practices affecting competition." The Eleventh Circuit used the wrong standards of proof and found that Petitioners' facts failed to meet those standards.

In addition, the Response fails to explain the Eleventh Circuit's reference to *Adkins* in *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005). The Response suggests that the *Pickett* panel cited but somehow did not rely on *Adkins*. *Pickett*, citing *Adkins*, held that claimants under the PSA must show that an unfair practice either does cause or is likely to cause an anticompetitive injury to prevail. *Pickett* at 14. In fact, the *Adkins* decision had adopted the "affecting competition" standard urged by Respondent at page 14 of its *Adkins* brief. In citing *Adkins*, the *Pickett* decision sheds light on the Eleventh Circuit's underlying reasoning in all of these cases, that an unfair practice under the PSA is not actionable absent a showing of anticompetitive effect. This Court should accept certiorari here or hold this matter for a decision in *London* and rule on the split in the circuits, restoring producers like Petitioners to the rights granted them in the PSA.

B. Respondent Ignores the Eleventh Circuit's Language in *Adkins* and *Mims* Requiring Proof of Discriminatory and Intentional Conduct to State a Claim Under the PSA.

The Response is in denial about the Eleventh Circuit requirements of "discriminatory purpose" and "specific targeting" in Adkins' and Mim's PSA claims. Ignoring *Butz v. Glover Livestock Comm.*, 411 U.S. 182, 93 S.Ct. 1455 (1973), the Respondent had argued in *Glass* and *Wheeler* that "there is no reported decision, however, where contract breaches or something other than an intentional act of discrimination or anti-competitive conduct were determined to be sufficient to support a PSA claim." *Glass* Brief at 21; *Wheeler* Brief at 17. Respondent had compared a fraud standard of intent to that for the PSA at page 15 of its brief in *Adkins* and page 17 of its brief in *Mims*.

Adopting the intentional targeting standard urged by Respondent, the Eleventh Circuit stated in *Adkins*, "nothing in the record suggests that Cagle JV ever delivered poor quality chicks to the Adkins, or any other broiler growers with any discriminatory purpose." (Pet. App. 17) The court then found that, "the Adkins did nothing to show that they were ever specifically targeted for insufficient or inferior feed." (Pet. App. 18) Finding no evidence of discrimination, or that the Adkins were "specifically targeted," the Eleventh Circuit summarily disposed of the Adkins' PSA, bird quality, and feed claims. (Pet. App. 18)

Respondent's assertion that the Eleventh Circuit found *no evidence* that Petitioners consistently ran out of feed or received unhealthy birds is belied by careful review of each decision. The *Mims* panel, after first finding that Mims and his employees provided deposition testimony that Mims received a significant number of "bad looking

birds" (Pet. App. 31), rejected Mims' PSA claim because, "Mims produced insufficient evidence that he received more bad birds than other growers because of retaliation." (Pet. App. 32) Addressing Mims' delayed feed claim, based on Mims' evidence that he frequently ran out of feed, the panel concluded that a jury could not reasonably conclude that "Mims was retaliated against." (Pet. App. 33) The court arrived at this result based upon the wrong interpretation of the PSA – an interpretation urged upon the court by Respondent – that the PSA requires evidence of *intentional* conduct.

Given the volume of evidence that Respondent's bird quality was substandard, and that feed shortages were frequent and common and that those problems were caused by the negligence of Respondent, Respondent was rash to assert before this Court that Petitioners presented no evidence supporting these claims. Respondent's own hatchery manager admitted that Respondent failed to properly vaccinate its pullet (young breeder flocks), resulting in disease outbreaks in the broiler houses. Respondent's own complex manager, and many of Respondent's employees, testified about serious disease problems caused by Respondent, particularly on Mark Glass' farm, problems that were well-documented in Respondent's own records, which were reviewed and summarized by Petitioners' expert. (Pet. App. 125-132)

Petitioners testified at length about the bad birds they received due to Respondent's actions or inaction. "We had rickets, we had e-coli in baby chicks, we had aspergillosis that apparently we were told had come from the hatchery. We had birds that would be rotten . . . they were green inside. They would die. We had consistent leg problems. We had birds that we brought to the farm with CAV . . .

We had birds that were brought with dermatitis . . . I had serious health problems on my farm that were chronic and consistent and continued for years." (Glass Depo. pp. 244, 290) Lucius Adkins testified, "for at least two years, every time we got birds, they were obviously inferior, sick, small, weak . . . There have been numerous instances of poor birds. And in a perfect world, all growers will get poor birds sometimes and good birds most of the time. I talked to growers who always got good birds and they bragged about it . . . Joe Gaines was one." (Adkins Depo. pp. 76, 87) The Adkins went from above average to below average for two years because of bad birds. (Jill Adkins Depo. p. 62) Wheeler testified, "It's not that there were problems with the chicks from time to time. I had problems with chicks all the time." (Wheeler Depo. p. 175) Petitioners' deposition testimony, and interrogatory responses, in which they specifically identified some of their poor quality birds, were confirmed by their employees, by Respondent's employees, and by records reviewed by Petitioners' expert, Dr. Paul Miller.

The record is also replete with evidence of feed delivery failures. Mims testified, "Every grow-out, at least at some point in every grow-out, we would run out of feed." (Mims Depo. p. 328) The Adkins documented in calendars and interrogatory responses six grow-outs in a two-year period on which they ran out of feed but they indicated they had many more. Wheeler testified that he ran out of feed more times than he could count. "I wouldn't be afraid to say\'75 or 100 times. I can recall grow-outs where it was 6 or 8 times in one grow-out." (Wheeler Depo. p. 175) Glass similarly testified that he ran out of feed often. (Glass Depo. pp. 462, 463) Two of Respondent's feed mill managers swore in affidavits and other Respondent employees

testified that problems with feed deliveries were chronic and longstanding. (Pet. App. 135-137) Petitioners produced uncontroverted evidence that the effect of running out of feed was devastating to the grower's income. (Pet. App. 136, 140)

The Eleventh Circuit's interpretation of the Packers & Stockyards Act to require some showing of intentional discrimination is also at odds with the Fourth, Sixth, and Eighth Circuits, which have properly interpreted this Court's holding in *Butz*. "Moreover, like the Eighth Circuit, we acknowledge that nothing in 7 U.S.C. § 204, which authorizes suspensions, 'confines its applications to cases of "intentional and flagrant misconduct" or denies its application in cases of negligent or careless violations.'" *Parchman v. U.S. Dept. of Agriculture*, 852 F.2d 858, 864 (6th Cir. 1988), citing *Farrow v. U.S. Dept. of Agriculture*, 760 F.2d 211, 216 (8th Cir. 1985) (quoting *Butz v. Glover Livestock*, 411 U.S. at 187). Similarly quoted in *Hutto Stockyard v. U.S. Dept. of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1999).

Petitioners assert that as between the integrator and the growers, it is unfair for the integrator to negligently fail to provide industry standard vaccination for birds and unfair for the integrator to negligently fail to provide for industry standard feeding. Petitioners claim that such unfair negligence is proscribed by the PSA, even if it is not shown to be purposeful. Respondent's negligence damaged Petitioners. This Court should grant certiorari and remand this case for review under a PSA negligence standard.

C. The Cases Presented Are Extremely Important to the Enforcement of the PSA and the AFPA, and the Court Should Exercise Its Discretion to Revisit the Lower Court's Clearly Erroneous Factual Findings.

Consistent with the tenor of its Response, Respondent argues that this Court should never grant certiorari based on a lower court's erroneous factual findings. Petitioners fully recognize that it is a rare case where review of a lower court's factual findings is warranted. However, because of the important public policy implications of this matter and the relation between factual finding and the proper proof standards, Petitioners assert that this is just such a case.

In affirming summary judgment for Respondent in these cases, the Eleventh Circuit ignored substantial evidence in the record, failed to draw permissible inferences from disputed facts, and apparently misunderstood the gist of Petitioners' primary complaint. Respondent paid its growers by comparing the efficiency of each grower to the group whose birds were processed in the same week. Efficiency was measured by how well the birds gained weight in comparison to the feed delivered to the farm. More efficient growers received more pay for each pound of birds. Birds unhampered by disease or feeding problems created more pounds to be paid.

Inferior birds do not perform as well. All of these Petitioners testified both as to normal flocks and later bad flocks where they received inferior and diseased birds in numbers much greater than normal flocks. Based upon that corroborated testimony and based on expert opinion detailing Respondent's negligent failures to vaccinate birds, there is a reasonable inference that Petitioners'

decline in rankings and lower pay resulted at least in part from Respondent negligently or intentionally delivering inferior or diseased birds to Petitioners. (Pet. App. 125-132, 153)

Running out of feed causes critical feed conversion problems in flocks. By either intentionally or negligently allowing Petitioners to run out of feed, Respondent placed Petitioners at a distinct disadvantage to all other growers within their group who did not run out of feed or who received double deliveries. (Pet. App. 135-137, 140) In addition, manipulating feed delivery and recovery figures and settlements to benefit one grower within the group (like Joe Gaines) disadvantaged all other growers settling within the same group. (Pet. App. 140, 145) Another reasonable inference from the evidence submitted by Petitioners is that their drop in their yearly average rankings was explained by Respondent's negligent or intentional failure to consistently deliver feed to Petitioners or account for feed used by Petitioners' flocks.

Where volumes of admissible probative evidence is ignored by the Circuit Court, and where that is encouraged by the application of wrong standards to important federal legislation, this Court can and should instruct as to improper fact finding.

CONCLUSION

From its inception, the Packers & Stockyards Act has been interpreted by this Court broadly to effectuate the evil sought to be remedied by Congress. "It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature